



**Kipserem & another v Kandie (Environment and Land Miscellaneous Application E001 of 2022) [2022] KEELC 4798 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 4798 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2022**

**L WAITHAKA, J**

**JUNE 9, 2022**

**BETWEEN**

**LUKA KIPSEREM ..... 1<sup>ST</sup> APPELLANT**

**PAUL KIPTOO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JULIUS KIPKORIR KANDIE ..... RESPONDENT**

**RULING**

1. By a motion dated May 28, 2022, the applicants seek the following orders.
  - a. That this application be certified as urgent and the same be heard *ex-parte* in the first instance.
  - b. That there be a stay of execution as herein already in force and or any other action in the Iten Mcelc No 14 of 2021 pending the hearing and determination of this application.
  - c. That this court be pleased to grant leave to the applicants to file an appeal out of time against the judgment made by the in the Magistrates Court at Iten in Environment and Land case No 14 of 2021 at any time.
  - d. That the said leave do operate as a stay of all proceedings.
  - e. That cost of this application be in the appeal.
2. The application is premised on the grounds stated on its face and the sworn affidavit of Paul Kiptoo on May 28, 2022. He avers that they filed a defence and counterclaim in Iten Mcelc 14 of 2021 and judgement was delivered on January 12, 2022 without considering the contents raised therein and without notice to their advocate; that they learnt of the judgment when they were served with the decree and eviction order; that their appeal raises weighty legal issues and if an order of stay of execution is not granted they will be evicted from the suit property.



3. The application is opposed *vide* a replying affidavit sworn by Julius Kipkorir Kandie on May 24, 2022. He averred that the lower court delivered its judgment on January 12, 2022 in favour of the respondent and the applicants were given 60 days to vacate the suit land voluntarily. Upon expiry of the 60 days, an eviction notice was issued and the same served upon the respondents together with a copy of the decree; that the applicants have not utilized the remedy provided for in the Land Act 2012 which if exercised, will not render the appeal nugatory; that the application and intended appeal are premature; that the applicants have not demonstrated sufficient cause to warrant issuance of the orders sought and neither have they satisfied the court they will suffer substantial loss should the orders sought not be granted.
4. Section 79 G of the Civil Procedure Act provides that appeals from the subordinate courts must be filed within a period of 30 days from the date of decree or order from which the appeal lies. The proviso to that section, however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion.
5. In exercise of that discretion, the court should take into account the length of delay, reason for delay, chances of the appeal succeeding if the application is allowed and degree of prejudice to the respondent, see the case of First American Bank of Kenya Ltd v Gulab P Shah & 2 others NBI (Milimani)Hccc No 2255 of 2000 [2002] 1 EA 65.
6. In the instant case, judgment was delivered on January 12, 2022. The motion before the court was filed on March 29, 2022 about 2½ months from the date of the judgment. It is the applicants' contention that they became aware of the judgment on March 24, 2022 when they were served with a decree and eviction order. I have taken the liberty to peruse the lower court file and noted the following; defense hearing was closed on October 26, 2021 and a mention date given to confirm filing of submissions on November 24, 2021. The court was to deliver judgment on December 22, 2021 but this did not happen. There is no notice in the file issued that judgment would be delivered on January 12, 2022 or/ and who was present when judgment was read and delivered on that date.
7. Failure to serve the judgment notice was not denied by the respondent. Under the circumstances, it is my considered view that the delay (5 days) to file the instant motion from the date they were served with the decree and eviction notice was not inordinate or excessive.
8. As for the reason for the said delay, I am satisfied with the applicants explanation that they were not aware of delivery of judgment and only came to learn of the same when they were served with the decree and eviction notice and swiftly filed the application. In paragraph 7 of this ruling, the court perused the lower court file and noted that no notice was issued that judgement would be delivered on January 12, 2022 and no parties were present when judgement was delivered.
9. As for the chances of the intended appeal succeeding, it is the applicant's case that the appeal is premised on the question of ownership of the suit property. In my view, this is arguable notwithstanding that it may not succeed. It is trite that in deciding whether an appeal is arguable of not, the court is bound to consider whether the said intended appeal raises a *bona fide* issue for determination by the court.
10. As for the prejudice which the parties may suffer, the same ought to be weighed against the right to be heard which is a constitutional right. The applicants having expressed their intentions to be heard, it is paramount that they be granted the said opportunity.
11. For the above reason, I find the applicant has satisfied the conditions for grant of leave to appeal out of time and prayer (c) is hereby granted. The prayer for leave to appeal out of time having been allowed, I now proceed to determine whether the leave to appeal out of time should operate as a stay of execution pending the hearing and determination of the appeal. Although prayer (d) in the application seeks stay



- of all proceedings, a look at paragraphs 6 and 9 of the grounds of the application and paragraphs 8 and 9 of his affidavit clearly show the applicant is seeking an order for stay of execution.
12. In exercising my discretion, I am guided by sections 1A, 1B, 3A of the *Civil Procedure Act* and article 159 (2)(d) of the *Constitution*. That courts are called upon to administer substantive without undue regard to procedural technicality.
13. The law for grant of an order of stay is settled. An applicant may satisfy the conditions set out in order 42 6(2) of the *Civil Procedure Rules*. These are;
- a. That substantial loss may result unless the order is made and that the application has been made without unreasonable delay; and
  - b. Furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.
14. The court is also guided by the principles cited in the case of *Peter Nakupang Lowar v Nautu Lowar* (2022) e KLR where it was held: -
- “The relevant law governing applications for stay of execution pending appeal is order 42 rule 6 1(2). The rule states as follows: -
- “(2) no order for stay of execution shall be made under sub rule (1) unless: -
- a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
15. In the same case, the court stated: -
- “courts have often discussed substantially the issue of stay of execution. As such there is a plethora of decisions which guide this court. One such decision is *Halal & another v Thornton & Turpin* (1963) Ltd (1990) e KLR where the court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that: -
- “...thus, the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay...”
16. In the case of *RWW v EKW* (2019) e KLR the court held:
- “...the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
17. In applying the above conditions and legal principles to the instant application, I have already found the applicant has satisfied the requirement for leave to file the appeal out of time and that the delay was not inordinate.



18. As to whether the applicant shall suffer substantial loss, unless an order of stay is granted, which requirement has, in numerous cases, been held to be the cornerstone of an application for stay of execution pending appeal, an order or eviction having been served upon the applicants, (the period of 60 days given to them to move out voluntarily having expired), there is no doubt in my mind that if the orders sought are not granted then the applicants will be evicted from the suit property before the appeal is heard and determined.
19. As regards the requirement for security for the due performance of such decree or order as may ultimately be binding on the applicants, I note that the applicants have neither offered security nor expressed willingness to furnish such security as may be ordered by the court. Although the applicants have not offered security or expressed willingness to furnish security for due performance of such decree or order as may ultimately be binding on them, being of the view that the court can fashion appropriate orders to cater for the interests of both of the applicant and the respondent, I am inclined to grant stay of execution of the judgment of January 12, 2022 but on the following conditions: -
- i. The applicants shall within 30 days of delivery of this ruling deposit in court Kshs 150,000/- as security for due performance or part performance of such order or orders as to costs as may ultimately be binding on them;
  - ii. The appellants/applicants to prepare and serve a record of appeal on the respondents within 30 days from the date of delivery of this ruling.
  - iii. The appellants/applicants to fix the appeal for directions within 15 days of service of the record of appeal.
  - iv. The appeal shall be heard and determined within three months (90 days) from the date of delivery of this ruling, unless for a good reason the court extends the time.
20. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 9TH DAY OF JUNE, 2022**

**L N WAITHAKA**

**JUDGE**

